United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

NO. 75-4235

United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 75-4235, 75-4269

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

On Application for Enforcement of Orders of The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

AILEEN A. ARMSTRONG,
JOHN C. ROTHER,
Attorneys,
National Labor Relations Board.
Washington, D.C. 20570

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

INDEX

AUTHORITIES CITED

Page

Statute:

Miscellaneous:

United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 75-4235, 75-4269

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOCAL 3, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO,
Respondent.

On Application for Enforcement of Orders
of The National Labor Relations Board

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that Local 3 violated Section 8(b)(4)(i) and (ii)(B) of the Act by inducing its members to refuse to perform work on construction sites where facilities were being erected for the Board of Education with an object of forcing the Board of Education to cease doing business

with Wickham-Perone, Iovine and other contractors whose employees were not represented by Local 3.

2. Whether substantial evidence on the record as a whole supports the Board's finding that Local 3 violated Section 8(b)(1)(B) of the Act by restraining and coercing Wickham Contracting Company in the selection of its representative for the purpose of collective bargaining.

STATEMENT OF THE CASE

These cases are before the Court on the application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), for enforcement of its orders issued against Local 3, International Brotherhood of Electrical Workers, AFL-CIO (hereafter "the Union" or "Local 3") on September 12 and September 26, 1975. The Board's Decisions and Orders are reported at 220 NLRB No. 57 (Chairman Murphy, Members Fanning and Jenkins) and 220 NLRB No. 117 (Members Fanning, Jenkins, and Penello). This Court has jurisdiction of the proceedings because the unfair labor practices occurred in Pelham and New York, New York.

I. THE BOARD'S FINDINGS OF FACT

Briefly, these consolidated cases arise from a primary labor dispute between Local 3, IBEW, and contractors employing electricians represented by other labor organizations, principally Teamsters Local 363. The facts found by the Board involve attempts during 1974 by Local 3 to monopolize for its members all electrical construction work within New York City. The Union attempted to achieve this goal in two related, and unlawful,

ways: by pressuring the Board of Education to cease doing business with electrical contractors not affiliated with Local 3, and by directly pressuring one of those non-Local 3 electrical contractors, Wickham Contracting Company, to withdraw from a multi-employer bargaining association.

The Board found that Local 3 violated Section 8(b)(4)(i) and (ii)(B) of the Act by inducing its members to walk off all construction projects funded by the Board of Education in the summer of 1974. The Board concluded that an object of that strike was to pressure the Board of Education to cease doing business with electrical contractors whose employees were not Local 3 members (A. 35-36).[1] The Board also found that Local 3 violated Section 8(b)(1)(B) of the Act by threatening Wickham with "continuing problems" if Wickham refused to withdraw from membership in a multi-employer association and by picketing Wickham with an object of forcing it to bargain with Local 3 without the services of the multi-employer association (A. 60-61). The evidence upon which the Board based its findings is essentially undisputed and is summarized below:

A. Background

The Union's attempt to secure all electrical construction work in New York City for its members involved many parties. Briefly, Local 3 represents electricians who perform construction work within the City of New York for certain electrical contractors who are contractually affiliated with it. These contractors in turn perform construction work for, among others, the Board of Education under a competitive bid and award system. In recent years, electrical contractors employing non-Local 3

---

[1] "A." references are to pages of the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

members, notably Wickham-Perone joint venture, have been increasingly successful in bidding for a share of the total work awarded by the Board of Education in the City. The electricians employed by Wickham-Perone are represented by Teamsters Local 363, which bargains in a multi-employer unit with the United Construction Contractors Association. Wickham Contracting Company is a member of this Association, although its co-venturer Perone is not. Thus the Local 3 affiliated contractors are in direct competition with Teamster affiliated contractors for construction contract awards, and the interests of the respective union members are directly aligned with those of the contractors contractually bound to them.

Wickham Contracting Company, Inc. is a New York corporation which performs electrical installation and contracting services at construction jobsites in the state of New York (A. 6; 26). Its principal office is located in Pelham, Westchester County, New York. Wickham shares its Pelham offices with Ralph Perone, a licensed electrician and the sole owner of his electrical contracting business (A. 43; 386). Wickham and Perone operate as a joint venture to work on City of New York projects which require a licensed electrical contractor, with Wickham providing the funds and bonding capital and Perone performing the work with its own employees (A. 43; 347). Perone is not an Association member, but his employees are Teamster members. He is party to a separate collective bargaining agreement with Teamster Local 363 (A. 43; 391). Wickham and Perone each maintain their own payroll and personnel, although some employees switch back and forth between Wickham jobs and Wickham-Perone joint venture jobs. They are paid separately on the basis of the jobsite on which their work was performed (A. 43; 363-364). Wickham operates separately on state and federal government jobs and on all work outside New York City (A. 362). Iovine, Inc. is a New York corporation which also performs electrical installation work (A. 7; 188).

Wickham and Iovine are both members of the United Construction Contractors Association ("the Association") and with other members of the Association were parties to a collective bargaining agreement with Local 363, International Brotherhood of Teamsters, effective November 15, 1970, to November 14, 1973. (A. 41; 124, 152, 333-334, 350-351). The employees of Wickham, Wickham-Perone joint venture, and Iovine are all represented by Local 363 of the Teamsters (A. 9; 72, 184, 188-189).

In August 1973, Local 3 filed a petition with the Board for certification as the representative of a single unit including all the employees employed by members of the Association. The Board, in the subsequent representation proceedings,[2] named the employees of Wickham and Iovine as part of the Association-wide unit (A. 104). An election directed for this unit was held September 19, 1974, with the initial vote favoring the Teamsters. After objections and challenges had been resolved, the Board determined that the Teamsters had defeated Local 3 (Decision and Certification of Representative, Case No. 2-RC-16344, dated October 15, 1975).

The Board of Education, an agency of the State of New York, contracts for construction and repair of school buildings through its Division of School Buildings, headed by Executive Director Hugh McLaren (A. 8; 194-195). Practically all such work is done through a bid and contract award system (A. 8). By law, when such construction work in excess of $50,000 is procured by bid, three subdivisions of the work – plumbing, heating and air conditioning, and electric – must be separately bid for and awarded (A. 8-9; 311).

---

[2] *United Construction Contractors Association*, 212 NLRB No. 127, n. 4 (1974), supplementing 210 NLRB 61 (1974).

The School Board had 120 major school jobs under construction in the summer of 1974 (A. 9; 195). The School Board has no direct relationships or dealings with any of the construction trade unions. The School Board does have about seventy electricians on its own payroll who perform miscellaneous functions and these electricians are members of Local 3. However, there is no contract between the School Board and Local 3 concerning them. Instead, they are paid the prevailing wage rates as established by the City Controller's office (A. 10; 214).

The Board of Education deals exclusively with contractors through the bid and contract award system (A. 10; 232). Wickham-Perone joint venture and Iovine were both successful bidders on certain Board of Education jobs and were awarded contracts for electric installation in early 1974 (A. 9; 157-158).

B. Local 3 pressures the Board of Education to cease doing business with non-Local 3 electrical contractors

Beginning the week of July 11, 1974, Local 3 electricians working at School Board construction sites ceased performing their work for their several contractors; the walkout lasted two months (A. 11; 306). The work stoppage was authorized at a union membership meeting on July 8 (A. 12; 201-202). At that meeting the Union's Business Manager, Thomas Van Arsdale, told the members that the men who worked on Board of Education jobs were not assured of job security because the Board was not awarding enough jobs to contractors with Local 3 men; instead, non-Local 3 contractors were winning contract awards with more frequency. Van Arsdale stated that he approved a work stoppage because there was no contract and because job security was being threatened (A. 12; 316, 323).

This action involved only the 200-300 Local 3 electricians working on school jobs; the bulk of Local 3's members continued to work, despite the absence of a labor contract (A. 11; 322). While there was no picketing of the Board of Education jobsites by Local 3, the strike soon brought all work on these jobsites to a halt (A. 11; 195). Since Local 3 contractors were performing 98 percent of the School Board's electrical work at that time and since the electrical contractors were unable to complete their necessary preliminary work, the other trades were unable to proceed, resulting in the shutdown of most of the School Board's major jobs (A. 11; 195).

On July 19, 1974, Executive Director McLaren met with Thomas Van Arsdale, business manager of Local 3, to discuss the work stoppage (A. 12; 197). When McLaren asked why the Local 3 electricians were off the job, Van Arsdale replied that he was concerned about the job security of his Local 3 members, that the work available to them in New York City was declining, and that, inasmuch as they had done practically all of the work for the Board of Education for many years, they should continue to do that work (A. 13; 197-198). McLaren replied that under municipal law the School Board must award the contract to the lowest responsible bidder and that it could not legally award it solely to contractors who were not affiliated by contract with Local 3 (A. 13; 198). Van Arsdale then said he was concerned about the school projects in which Wickham-Perone and Iovine were performing the electrical contracting. He claimed that Wickham-Perone was not paying the prevailing wage rate (A. 13; 198-199). McLaren said he was concerned about the delays on 120 major jobs due to the electricians' work stoppage, and he asked Van Arsdale what it would take to get Local 3 men back on the job. Van Arsdale stated that he wanted full assurance from the Board of Education that job security would be given to the Local 3 electricians.

The meeting ended with McLaren saying he would talk to his immediate superior, the deputy chancellor (A. 13-14; 199-201).

Immediately following this meeting McLaren concluded that it would be better to stop a few jobs rather than all 120 major school projects, and he sent letters to Wickham-Perone and to Iovine and some other small electrical maintenance contractors not aligned with Local 3, ordering them off their Board of Education jobs (A. 14; 202). The letters told each of the contractors that the labor he was using was the cause of work stoppages on other Board of Education projects and that he must stop work until such time as he furnished labor that would not cause a stoppage.[3] (A. 14; 63)

Anthony Biele, president of Wickham, who was in charge of the joint venture Wickham-Perone, was telephoned the same day, July 19, by one of McLaren's subordinates, Burns, who told him that the Board of Education was sending him the described letter and that he was to leave his jobs immediately until he acquired other labor that would not cause work stoppages. Biele asked how he was doing that, and Burns replied, by not employing Local 3 men. Biele said he would not pull his men off the job until he got something in writing (A. 14; 159-161).

Biele received the McLaren letter ordering him off the job the following Monday, July 22. He telephoned McLaren, who told Biele he wanted his men off the job at once and accused him of not paying the prevailing wages and of having too many apprentices on the jobs. Biele

---

[3] The letter purported to invoke Article 5 of the Board of Education contract, which provided that a contractor shall not have work performed or labor or means employed in carrying out his contract that would cause or result in a suspension, delay, or strike of the work under the contract of any of the trades working in or about the premises or in any building of the Board of Education (A. 63).

protested and told McLaren to consult the Controller who had investigated him on this score and found that he paid the appropriate wages and employed the proper number of apprentices. McLaren told Biele he was causing work stoppages by not employing Local 3 members, and to get his men off the job immediately. Biele asked if there was any way he could resolve the matter; McLaren answered that he could work only by joining or being a member of Local 3 (A. 15; 162-165, 179-180).

A half-hour later Biele was told by his foremen that they had received School Board field directives (A. 67) to leave the jobsites, and Biele told them he had no choice and they should comply (A. 15; 165). The Wickham-Perone electricians left the jobsites and did not return until three or four weeks later, after the contractor obtained a temporary restraining order enjoining the Board of Education from preventing Wickham-Perrone from performing its contracts (U.S. District Court, S.D.N.Y., dated July 30, 1974, A. 64-66, 165-167), and after the Board of Education rescinded the stop work orders against Wickham-Perone, and others, by letters dated August 6, 1974 (A. 15; 68, 70, 172).

President Anthony Biele was called by and met with Local 3's business representative, Bernard Rosenberg, on July 25, 1974. Union Representative Rosenberg told Biele that if he joined with Local 3, Local 3 would give him good men to complete the Wickham-Perone contracts on the school jobs, mentioning each job specifically (A. 21; 169-171, 173, 185). Biele refused Rosenberg's request, replying that he could not do this as a member of the Association, adding "I can't vote for my men. I can't have my men vote for Local 3" (A. 21-22, 45-46; 170, 336-338, 407-415).

Eugene Iovine, president of electrical contractor Iovine, also received a telephone notice to stop work followed by a Board of Education writ-

ten stop work order on July 23, 1974. The call to him came from School Board Director of Construction Turecamo, who told Iovine his men would have to leave the two school jobs they were on because Local 3 was stopping work on over 100 school jobs unless Teamster affiliated contractors and non-affiliates of Local 3 were removed from Board of Education jobsites. Iovine called the School Board action ridiculous and said he intended to finish his contract jobs. Turecamo replied that Iovine would be receiving a letter from Director McLaren telling Iovine that it did not have the type of labor that Local 3 wants on the jobs. Further, said Turecamo, if the Iovine electricians did not stay away from the two jobs, he would lock the gates of the jobsites (A. 15-16; 189-191). After receiving the written stop work order, Iovine and his men continued to work in defiance of the instructions to stop (A. 16; 193).

On July 25, 1974, Director McLaren telephone Van Arsdale to inform him that the non-Local 3 contractors had been removed from their school jobs and to express the hope that Local 3 would return to work. Van Arsdale in reply demanded a meeting with McLaren's superior, Vice Chancellor Gifford (A. 16-17; 205). This meeting took place that same afternoon. At it, Van Arsdale spoke of the need to provide job security for Local 3 members. He felt that inasmuch as Local 3 had always done Board of Education work they should continue to do it, and he wanted assurance from the Board that his men would not be put out of work (A. 17; 205-206, 288-290). When Dr. Gifford pressed Van Arsdale on what the School Board could do, Van Arsdale alluded to a dispute between Local 3 and Local 363 of the Teamsters and noted that the School Board had let contracts to contractors who were not Local 3 contractors, naming Wickham-Perone (A. 17-18; 294-295). Dr. Gifford asked for a concrete proposal in writing from Van Arsdale, and promised to set up a meeting with the Board of Education (A. 18; 289-290).

The next meeting took place in the office of the deputy mayor on August 20, 1974, with Deputy Mayor Cavanaugh, Deputy Corporation Counsel Buxbaum, School Board Chancellor Anker, School Board President Regan and several School Board members present in addition to McLaren and Van Arsdale (A. 18; 291). Van Arsdale spoke of job security for members of Local 3, and mentioned a layoff plan or list proposal. Under this plan the electricians working for contractors on public projects would constitute a work force to be listed as they were laid off at the completion of their jobs. Contractors awarded new public work would then be required to hire electricians from the layoff list in order of seniority of layoff before hiring elsewhere. Thus members of Local 3 on the list would be hired by contractors who did not have collective bargaining contracts with Local 3, and the same situation would apply to members of Local 363 (A. 19; 231, 291-293). On the day following the meeting, August 21, 1974, Van Arsdale sent a letter containing an outline of the layoff plan to School Board President Regan (A. 19; 112-113, 299-300).

The School Board members expressed doubt as to the legality of this plan. President Regan said that the Board of Education did not deal with the unions of its construction contractors, but only with the contractors themselves through competitive bidding (A. 20; 232). Other doubts relating to the proposal's effect on minority affirmative action and decentralization programs were expressed (A. 281).

Following the August 20 meeting the strike by Local 3 continued for several weeks. A temporary injunction against the work stoppage was issued by the U.S. District Court (E.D. N.Y.) on September 13, 1974, under Section 10(1) of the Act (A. 21; 108-111, 218).

Wickham-Perone continued to bid on new contracts with the School Board despite the pressure from Local 3 and was the low bidder on a

large contract for the Martin High School renovation (A. 22; 213). Since the U.S. District Court restraining order of July 30, 1974 (A. 64-66) enjoined the School Board from, among other things, holding up contract awards to Wickham-Perone, Director McLaren forwarded their low bid to the Board with a recommendation for award of the contract (A. 22; 213-214). When this award came up at the School Board's public meeting held October 16, 1974, Local 3's business representative, Rosenberg, appeared and urged the award be denied or postponed. Rosenberg alleged that Wickham-Perone paid kickbacks, did not abide by the apprenticeship program and did not pay the prevailing wage to its men (A. 22-23; 265, 268, 273-274).

The School Board took the position that it was not the proper forum to hear and determine such complaints, that hearing and review board procedures existed under the Controller's jurisdiction over such complaints, and that it could not refuse or postpone the award to Wickham-Perone (A. 23; 269-270, 275-276).

C. Local 3 pressures a Teamster affiliated contractor to withdraw from membership in a multi-employer bargaining association and to bargain individually with it

During the period Local 3 was striking Board of Education jobsites, it was also demanding recognition as bargaining representative of employees employed by Wickham Contracting Company. In the spring of 1974, Local 3 Business Representative Rosenberg came to Wickham's Pelham office and spoke to a group including Anthony Biele, Ralph Perone, and others, about the advantages Wickham could enjoy from signing an agreement with Local 3 (A. 43-45; 369-371, 377-379, 393-394, 405-407). Rosenberg stated that Wickham would be better off with the Union than with the Teamsters and that Wickham would not have the troubles it was

then having if it signed with Local 3 instead of the Teamsters (A. 45; 370-371, 378). At this point, the "troubles" apparently referred to apprenticeship training and minority trainee programs (A. 394). Comins, an electrical engineer for Wickham who was also present, responded that Wickham could not join Local 3 because of the Association contract already signed with the Teamsters (A. 44; 370). Rosenberg admitted he knew at that time that Wickham was a member of the Association (A. 45; 418). No agreements were reached at this time, other than an agreement to meet again.

The next meeting took place on July 25, 1974, and has already been described (*supra*, p. 9). Rosenberg requested that Wickham withdraw from the Association and join with Local 3. Biele refused in light of his company's members' ip in the Association and the desires of his employees.

After Local 3 had apparently lost the September 19 election in the Association-wide bargaining unit but while it was protesting the election results before the Board, Rosenberg directed that a picket line be set up with signs stating that Wickham-Perone employees were on strike (A. 47; 416). The picketing at the Pelham office was suspended after one week when Biele agreed to meet with the business manager of Local 3, Van Arsdale. This meeting, with Albert Biele and Perone also present, took place on October 7. Van Arsdale suggested at this meeting that Wickham pull out of the Association and have a separate election so that Wickham employees could go into Local 3 (A. 47-49; 341-344, 380-383, 387-392). When it became evident that Wickham was not going to accept this suggestion, Van Arsdale raised a question about Wickham's compliance with city job specifications. Van Arsdale stated that he could make it "very beneficial" if Wickham and Perone went with Local 3 "because there were specs written up for City of New York jobs, and certain things could be done to make sure the letter of the spec was done on

every job, and that he was going to have a meeting with certain people to make sure all contractors in the City of New York, not specifically stating [Wickham-Perone], were living up to the letter of the spec" (A. 49, 54; 389). This conversation took place after Wickham-Perone had been notified on July 22 that it could no longer perform certain school construction jobs in the city and after the Company had instituted a civil suit against the Board of Education and Local 3 for "removing them" from these jobs (A. 337).

Local 3 began picketing Wickham's office at Pelham in early October, a few weeks after the Board election which it had lost (A. 51; 339, 386, 416). On one day 300 to 500 pickets were out in front of the office, but other than that day the number was about ten (A. 51; 339, 386-387). Although no Wickham employees were then on strike, some of the signs carried by the pickets said Wickham employees were on strike (A. 51; 339, 360-361).

The picketing was halted for the meeting with Van Arsdale previously described (pp. 13-14), but resumed a few weeks after the meeting and continued through the time of the hearing below (A. 51; 345-346, 392). At the time of the hearing before the Board, the picketing was taking place every day except on holidays and in bad weather, from 10 a.m. to 2 p.m. The picket signs varied, some saying "Employees of Wickham on Strike", some saying "Employees of Wickham-Perone on Strike," and some saying the strike was for recognition and decent wages (A. 51; 345, 371-372). Picketing was extended to the Downstate Medical Center and Kings County Hospital jobsites beginning December 3 (A. 51-52; 392-393). On that day about 100 pickets were present (A. 52: 393, 395-396). The picketing has continued since with about 6 to 10 pickets, in accord with a police order (A. 52; 346, 395).

II. THE BOARD'S CONCLUSIONS AND ORDER

On these facts, the Board found that an object of the Union's work stoppage was to pressure the Board of Education to cease doing business with Wickham-Perone, Iovine, and other contractors not affiliated with Local 3. The Board found that such conduct constituted unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(B) of the Act (A. 29).

The Board's order requires the Union to cease and desist from the unfair labor practices found, to post appropriate notices, and to sign notices for posting by the Board of Education and by the electrical contractors (including those affiliated with Local 3 and those with Local 363), if they are willing (A. 30-31, 35-36).

The Board also found, in a separate proceeding, that the Union, by the conduct of its agents Rosenberg and Van Arsdale, threatened Wickham with continuing problems if Wickham refused to withdraw from the Association and to recognize and bargain with the Union as the collective bargaining representative of the Wickham employees (A. 54-55). The Union picketed Wickham, as a separate entity and as part of a joint venture, with an object of forcing Wickham to recognize and bargain with Local 3 on an individual basis (A. 55). The Board concluded that this conduct restrained and coerced Wickham in the selection of its representative for collective bargaining purposes, in violation of Section 8(b)(1)(B) of the Act (A. 56, 60).

The Board's order requires the Union to cease and desist from "by threats and picketing" and from "in any like or related manner restraining or coercing" Wickham Contracting Company in the selection of its representative for the purpose of collective bargaining. Affirmatively, the Board's order requires Local 3 to post appropriate notices.

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT LOCAL 3 VIOLATED SECTION 8(b)(4)(i) AND (ii)(B) OF THE ACT BY INDUCING ITS MEMBERS TO REFUSE TO PERFORM WORK ON CONSTRUCTION SITES WHERE FACILITIES WERE BEING ERECTED FOR THE BOARD OF EDUCATION WITH AN OBJECT OF FORCING THE BOARD OF EDUCATION TO CEASE DOING BUSINESS WITH WICKHAM-PERONE, IOVINE AND OTHER CONTRACTORS WHOSE EMPLOYEES WERE NOT REPRESENTED BY LOCAL 3.

Section 8(b)(4)(B) of the Act, commonly referred to as the Act's secondary boycott provision, makes it an unfair labor practice for a union (i) "to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal in the course of his employment . . . to perform any services" or (ii) "to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce," where, in either case, "an object thereof is . . . forcing or requiring any person . . . to cease doing business with any other person." As interpreted by the Board and the courts, Section 8(b)(4)(B) does not prohibit a union from appealing directly to the employees of an employer with whom it has a primary labor dispute. Rather, it prohibits unions from bringing pressure to bear on other employers, neutrals in the primary dispute, with an objecting of forcing them to cease doing business with the employer or person "with whom the union is principally at odds." *Local 1976, United Brotherhood of Carpenters and Joiners of America v. N.L.R.B.*, 357 U.S. 93, 99 (1958); *National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612, 622 & n. 8 (1967); *N.L.R.B. v. Local Union No. 3, IBEW*, 477 F.2d 260, 264 (C.A. 2, 1973). This is because the Congressional purpose was to preserve "the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and shielding unoffending employers and others from pressures in controversies not their own."

N.L.R.B. v. Denver Building and Construction Trades Council, 341 U.S. 675, 692 (1951). "That purpose was to confine labor conflicts to the employer in whose labor relations the conflict had arisen, and to wall off the pressure generated by that conflict from unallied employers." *Miami Newspaper Pressmen's Local No. 46 v. N.L.R.B.*, 322 F.2d 405 (C.A.D.C., 1936). In short, as the Supreme Court stated in *National Woodwork Manufacturers Association, supra*, 386 U.S. at 632, "Congress, in enacting Section 8(b)(4)(B) . . . barred as a secondary boycott union activity directed against a neutral employer, including the immediate employer, when in fact the activity directed against him was carried on for its effect elsewhere."

Whether or not a union's conduct is motivated by the proscribed object of forcing a neutral employer to stop dealing with the primary employer is a question of fact for the Board which, like other factual findings, is conclusive if reasonable on all the evidence. *N.L.R.B. v. Denver Building Trades Council, supra*, 341 U.S. at 691-692; *Bedding Workers Local 140 v. N.L.R.B.*, 390 F.2d 495, 499-500 (C.A. 2, 1968), cert. denied, 392 U.S. 905. Moreover, the proscribed object need not be the sole object or even the primary object, but simply "an object." *N.L.R.B. v. Denver Building & Construction Trades Council, supra*, 341 U.S. at 688-689; *Wilson v. Milk Drivers' Union, Local 471*, 491 F.2d 200, 203 (C.A. 8, 1974), and cases cited therein.

In short, Section 8(b)(4)(B) requires classification of disputed conduct as either "primary" activity in response to a dispute arising out of the labor relations of the employer against whom the conduct is directed, or "secondary" activity which is directed against a neutral employer with whom the Union has no real dispute.

As we show below, substantial evidence supports the Board's finding "that an object – if not the principal object – of the strike of the school board jobs by Respondent Local 3 IBEW electr[illegible]ns was to pressure the Board of Education, through pressure on its contractors, to cease doing business with electrical contractors whose employees were not Local 3 members, in particular contractors Wickham-Perone and Iovine whose electricians were Teamster Local 363 members" (A. 23).

Local 3 has long sought to secure a monopoly on the representation of workers employed by electrical contractors doing business within its jurisdiction, the City of New York. See *Allen Bradley Co., et al. v. Local Union No. 3, IBEW, et al.*, 325 U.S. 797, 799 (1945). While this goal is not in itself unlawful, it does not privilege the Union's pursuit of it by any and all means without regard to statutory restrictions against secondary pressure. See, *e.g., N.L.R.B. v. Local 3, IBEW*, 325 F.2d 561 (C.A. 2, 1963); *N.L.R.B. v. Local 3, IBEW*, 362 F.2d 232 (C.A. 2, 1966); *N.L.R.B. v. Local 3, IBEW*, 467 F.2d 1158 (C.A. 2, 1972); *N.L.R.B. v. Local 3, IBEW*, 477 F.2d 260 (C.A. 2, 1973).

Here, Local 3 has sought to extend its representation to include employees of contractor-members of the United Construction Contractors Association who were performing work in the City of New York. However, failing to secure such representational rights directly, the Union chose to force the Board of Education to cease doing business with any contractor who did not recognize Local 3. Thus, the Union clearly overstepped the bounds confining its primary dispute with members of the United Construction Contractors Association, and infringed on the neutral zone protecting the Board of Education and those electrical contractors whose employees were induced to abandon their work under Section 8(b)(4)(i)(ii)(B).

As described more fully in the Statement, *infra*, Local 3, through its business manager, Van Arsdale, induced and authorized its members to withhold their services on jobs their employers were performing for the Board of Education to force the Board of Education to cease doing business with employers who did not recognize Local 3 or employ its members. Thus, Union Representative Rosenberg admitted that, at a meeting on July 8, 1974 attended by 1500 to 2000 members, Van Arsdale approved a work stoppage because the Board of Education was not awarding enough work to contractors with Local 3 men (A. 12). Shortly thereafter Local 3 members began walking off jobs their employers were performing for the Board of Education. Local 3 members did not walk off jobs their employers were performing for others. This selective work stoppage continued until enjoined under Section 10(1) of the Act on September 13, 1974. In these circumstances, it is clear that the walkout was designed to bring pressure to bear on the Board of Education, and to draw the Board of Education into a labor dispute not its own. Indeed, in a meeting on July 19, 1974 with School Board Executive Director McLaren, Van Arsdale, in discussing the work stoppage, expressed the Union's position that the Board of Education should award its electrical construction work exclusively to Local 3 contractors. Van Arsdale specificially mentioned that the Union was concerned about school projects where Wickham-Perone and Iovine were performing the electrical work. Since the School Board's work had been brought to a virtual standstill by Local 3's work stoppage, McLaren asked Van Arsdale what it would take to get Local 3 men back on the job. Van Arsdale bluntly stated that he wanted full assurance from the Board of Education that Local 3 members would be given job security, *i.e.*, exclusive rights to School Board jobs. The Union's action provoked the Board of Education to attempt to cancel contracts awarded to and being performed by contractors such as Iovine and Wickham-Perone who did not recognize Local 3.

Moreover, during the work stoppage the Union was concurrently pressuring Wickham-Perone to sign up with Local 3 and utilize Local 3 members, suggesting that problems with the School Board could thus be ended. In these circumstances, the Board's finding that the Local 3 walkout was intended to draw the Board of Education - a neutral – into a dispute not its own is not only reasonable on the whole record, it is unavoidable.

The Union's defenses are patently without merit. The fact that contracts between Local 3 and the contractors who recognized it expired prior to the walkout on the Board of Education's job is completely irrelevant. As the Board found, the statutory prohibition against secondary activity is not premised upon a contractual no-strike provision. And it is clear that the work stoppage was unrelated to any labor dispute then extant between Local 3 and Local 3 contractors, for Local 3 members continued to work at all their respective employers' jobs except for those being performed for the Board of Education.

Similarly, the Union's contention that the work stoppage was in furtherance of a primary labor dispute with the Board of Education must fail for lack of supporting evidence. Thus, although the Union maintains that the primary objective was to achieve a "layoff plan" from the Board of Education, the Union failed to establish that any primary relationship existed between it and the Board of Education. The Local 3 members for whom the Union sought the "layoff plan" were not employees of the Board of Education and Local 3 had no bargaining relationship with the Board of Education. Indeed, even if such a "layoff plan" could be characterized as a subcontracting agreement lawful under Section 8(e) of the Act, the attempt to secure such an agreement would not be primary activity. It might then be lawful secondary activity under Section 8(b)(4)(A) of the Act, but would still violate Section 8(b)(4)(B), the section relevant to the instant case, where, as here, pressure is applied either to

force non-union contractors off existing jobs or to force the signatory's compliance with the 8(e) agreement once obtained. *Local 1976, United Brotherhood of Carpenters v. N.L.R.B. (Sand Door)*, 357 U.S. 93, 105 (1958); *Wilson v. Milk Drivers Local 471*, 491 F.2d 200, 206 (C.A. 8, 1974); *N.L.R.B. v. Carpenters Dist. Council of New Orleans*, 407 F.2d 804, 806 (C.A. 5, 1969); *N.L.R.B. v. IBEW, Local 761*, 405 F.2d 159, 163 (C.A. 9, 1968). Clearly then, as the Board found the issue of the legality of the layoff plan under Section 8(e) of the Act is irrelevant to the propriety under Section 8(b)(4)(i)(ii)(B) of the Union's efforts to force the Board of Education to dishonor its existing contracts with non-Local 3 contractors.

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT LOCAL 3 VIOLATED SECTION 8(b)(1)(B) OF THE ACT BY RESTRAINING AND COERCING WICKHAM CONTRACTING COMPANY IN THE SELECTION OF ITS REPRESENTATIVE FOR THE PURPOSE OF COLLECTIVE BARGAINING.

Under Section 8(b)(1)(B) of the Act, a union is prohibited from "restrain[ing] or coerc[ing] . . . an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances." The Board, with court approval, has consistently held that "[b]oth the language of the section and its legislative history demonstrate Congress' intention to safeguard the rights of employers freely to designate representatives of their own choosing for the purposes, *inter alia*, of collective bargaining." *Local 294, Teamsters, etc.*, 126 NLRB 1, 4 (1960), enf'd., 284 F.2d 893 (C.A. 2, 1960).[4]

---

[4] See *Teamsters Local 70 (California Trucking)*, 194 NLRB 674 (1974), enforced, 470 F.2d 509 (C.A. 9, 1972) (striking and picketing to compel individual bargaining from members of employer bargaining association); *Union De Trabajadores Industriales*

(continued)

The statutory protection afforded an employer's selection of a representative to deal with a union is thus in some respects the correlative of the Section 7 guarantee of the employees' right "to bargain collectively through representatives of their own choosing." As stated by this Court, "This right of employees and the corresponding right of employers . . . to chose whomever they wish to represent them is fundamental to the statutory scheme. In general, either side can choose as it sees fit and neither can control the other's selection. . . ." *General Electric Company v. N.L.R.B.*, 412 F.2d 512, 516-517 (1969). See *N.L.R.B. v. Local 964 Carpenters*, 447 F.2d 643 (C.A. 2, 1971).

This prohibition extends to union picketing of a single member of a multi-employer bargaining association for the purpose of forcing him to bargain on individual basis. In the language of the Senate Report on this provision of the Act: "a union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members. . . ."[5]

---

[4] (continued) *De Puerto Rico, Inc.*, 174 NLRB 489 (1969) (picketing by minority union of members of employer association for purposes of forcing them to recognize union as exclusive bargaining representative). *Carpet, Linoleum and Soft Tile Layers Union, Local 1238, etc.*, 183 NLRB No. 7, pp. 9-10 (1970) (strike to compel individual members of employer association to sign separate contracts with the union); *Int'l Union of Operating Engineers, Local 825*, 145 NLRB 952, 962 (1964) (threat to cease negotiations with an employer association and demand to deal with individual employers); *Ice Cream Frozen Custard Industry Employees, etc., Local 717*, 145 NLRB 865, 871 (1964) (same).

[5] S. Rep. 105, 80th Cong., 1st Sess., p. 21.

As we show below, there is ample evidentiary support for the Board's finding that Local 3 violated Section 8(b)(1)(B) of the Act insofar as it restrained and coerced Wickham Contracting Company by picketing to force Wickham to abandon the United Construction Contractors Association, the bargaining representative of Wickham's choice.

As set forth more fully in the Statement, the record shows that Local 3 was anxious to secure representation rights over the electricians employed by members of the United Construction Contractors Association in New York City. It properly filed a representation petition seeking to displace the Teamsters as the bargaining representative of the employees in this unit. However, the Union was not content with the lawful means available to attain its end. It also resorted to an unlawful secondary boycott directed against the services of Wickham-Perone, and other non-Local 3 contractors, and picketed Wickham Contracting Company with the unlawful object of preventing Wickham from retaining the bargaining representative of its choice. Thus, Van Arsdale, Local 3's business manager, threatened Wickham with "certain problems" regarding city specification enforcement on its current jobs if Wickham refused to withdraw from the United Construction Contractors Association. This threat took on added meaning in context; for the Wickham-Perone joint venture had just been told by the Board of Education on July 22, at the apparent urging of Local 3, to stop work on certain school construction jobs. The Union followed these threats with picketing at Wickham's office and a construction jobsite which continued for over a year in an attempt to coerce Wickham into withdrawing from the Association.[6] On two occasions

---

[6] It is beyond question that the means selected to achieve the Union's objectives – picketing – was coercive within the meaning of Section 8(b)(1)(B). See *Local 423, Laborers International Union of North America, AFL-CIO (Mansfield Flooring Co.)*, 195 NLRB 241 (1972), enf'd, 82 LRRM 2478 (C.A.D.C., 1973); see also,

(continued)

mass picketing was employed with from 300 to 500 men at Wickham's Pelham office and about 100 pickets at the Wickham jobsite at Downstate Medical Center. The picketing began immediately after the representation election had been held in the Association-wide unit, and while Local 3 was challenging the apparent Teamster victory before the Board.

In these circumstances – where the Union's threats, the timing of the picketing, and the restriction of the picketing to Wickham all point to an intent to deprive Wickham of the right to select the Association as its bargaining representative – the evidence clearly supports the Board's finding that an object of the picketing was to force Wickham out of the Association and not, as the Union contends, solely to support its recognitional demands upon the United Construction Contractors Association.

Contrary to the Union contention, the record would not permit a finding that the Union was unaware that its picketing was directed at Wickham, a member of the United Construction Contractors Association. Testimony credited by the Board establishes that picket signs were expressly directed against Wickham Contracting Company.[7] Moreover, the

---

[6] (continued) *International Hod Carriers Local 1140 (Gilmore Construction Co.)*, 127 NLRB 541, 545 n. 6 (1960), enf'd., 285 F.2d 397 (C.A. 8, 1960), cert. denied, 366 U.S. 903. Moreover, the fact that the picketing here did not achieve its illegal objective is immaterial; the question is whether the conduct in question tends to interfere with a right protected by the Act – here the employer's right to freely choose his representatives. See *International Typographical Union (American Newspaper Publishers Association)*, 86 NLRB 951, 958-959 (1949), enf'd, *sub. nom., ANPA v. N.L.R.B.*, 193 F.2d 782, 805 (C.A. 7, 1951). See also, *Meat Cutters Local 81 v. N.L.R.B.*, 458 F.2d 794, 801 n. 20 (C.A.D.C., 1972).

[7] "[Q]uestions of credibility are for the trier of fact" whose resolution will not be overturned by a court unless the credited testimony is "hopelessly incredible" on its face "or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony." *N.L.R.B. v. Warrensburg Board & Paper Corp.*, 340 F.2d 920, 922 (C.A. 2, 1965).

Union does not deny that it knew that Wickham was a member of the Association. The Board's direction of election in the Association unit expressly mentioned Wickham as a member.

Similarly the Union's contention that Wickham could lawfully withdraw from the Association is irrelevant to the issue of whether the Union could lawfully coerce Wickham into withdrawing. Once Wickham made it clear that it did not desire to withdraw its authorization from the Association enabling it to serve as Wickham's bargaining representative, Wickham's selection was protected under the freedom of choice provided by Section 8(b)(1)(B). Local 3's conduct, intended to deprive Wickham of the services of the Association, was clearly coercion of Wickham which tended to restrain the exercise of free choice. In any event Wickham could not lawfully withdraw from the Association at the time of the picketing; for the Board has already determined that the Association-wide unit was appropriate and had held a election in that unit. In such circumstances, an employer is required to refrain from recognizing any union pending the Board's determination of the question concerning representation and to abide by the results of the election. *N.L.R.B. v. Burke Oldsmobile, Inc.*, 288 F.2d 14, 16 (C.A. 2, 1961); *Empire State Sugar Company v. N.L.R.B.*, 401 F.2d 559, 562 (C.A. 2, 1968). Accordingly, the Union's picketing to force Wickham out of the Association is clearly violative of Section 8(b)(1)(B). See cases cited, *supra*, p. 21 n. 4.

Finally, the Union's contention that its picketing was permissible under Section 8(b)(7) of the Act, the section which governs recognitional picketing, misses the mark. While the Union undoubtedly had a recognitional objective in picketing Wickham, it also had another objective – to force Wickham to abandon the bargaining representative of its choice.

Where picketing has an illegal objective, the presence of a contemporaneous legitimate purpose does not immunize the picketing from regulation. *Meat Cutters Union Local 81 v. N.L.R.B.*, 458 F.2d 794, 801-802 (C.A. D.C., 1972).

CONCLUSION

For the reasons stated, it is respectfully submitted that a judgment should be entered enforcing the Board's orders in full.

AILEEN ARMSTRONG,
JOHN ROTHER,
Attorneys,
National Labor Relations Board.
Washington, D.C. 20570

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

March, 1976.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	Nos. 75-4235, 75-4269
LOCAL 3 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

Gutterman and Pollack
Att: Robert J. Dinerstein, Esq.
71 S. Central Avenue
Valley Stream, New York

Menagh, Trainor & Rothfeld
Att: Norman Rothfeld, Esq.
130 East 40th St.
New York, New York 10016

Elliott Moore

/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 5th day of May, 1976.